No. 87-1563

IN THE

Supreme Court of the United States

October Term, 1987

JOHN A. MATT, SR.,

Petitioner,

against

JAMES L. LAROCCA, as Commissioner of the New York State Department of Transportation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION

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Dated: April 4, 1988

Questions Presented.

1. Whether a public employee who has not been asked to waive immunity may be terminated for refusing, in a departmental investigation, to answer questions directly related to the performance of his duties and responsibilities.

2. Whether, after the employee has invoked his privilege against self-incrimination, the employer's counsel is obliged, in ordering the employee to answer such questions, to advise the employee and his attorney that immunity from prosecution would attach to his testimony.

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BRIEF IN OPPOSITION.

Petitioner seeks a writ of certiorari to review the order of the New York State Court of Appeals entered in his proceeding on December 21, 1987, which reversed, unanimously, the order of the Appellate Division of the Supreme Court, Third Judicial Department, annulling by a 3-2 vote the dismissal of petitioner from his position.

Statement of the Case.

Prior to November 23, 1984, petitioner was employed by the New York State Department of Transportation (DOT) as Section Superintendent of Waterways Section 4 headquarters in Utica, New York. In that position, he was reponsible for the maintenance of a section of the State Canal and had approximately 57 permanent employees and 10 seasonal employees under his supervision.

Early in 1984, respondent became aware of reports of widespread misconduct by DOT employees in petitioner's section. The reports involved unauthorized absences from duty and use of State property and facilities for the personal benefit of employees. Following an investigation, petitioner was served with charges of misconduct and suspended from his position.

On April 16, 1984, the respondent issued a subpoena *duces tecum* to the petitioner under the authority of Public Officers Law § 61, directing him to be examined under oath as to matters under his jurisdiction and to produce a diary maintained by him during the time in question. Petitioner refused to appear on the scheduled date. Respondent then applied to the Supreme Court for an order enforcing his subpoena, and an order was entered directing his appearance.

Accordingly, on August 14, 1984, petitioner was examined under oath by DOT's assistant counsel, Joseph Davidson. He was represented by counsel. After answering a number of questions concerning the organization and work assignments of personnel in Waterways Section 4, petitioner refused to answer a series of further questions relating specifically to the subject matter of the charges pending against him, citing, on the advice of

counsel, his Fifth Amendment privilege against self-incrimination. Mr. Davidson then warned him several times that his refusal to answer questions would be considered acts of insubordination. Despite such orders and warnings, petitioner refused to answer questions. He also refused to produce his diary as ordered, on the same ground.

Petitioner was thereupon served with a second Statement of Charges, dated October 2, 1984, alleging insubordination in refusing to answer questions when so ordered, specifically, directly and narrowly relating to the performance of his official duties and in failing to produce his diary. A hearing was held on October 17, 1984. In the course of the hearing petitioner called Mr. Davidson as a witness, who testified that at the time of the examination under oath, the district attorney's investigation into activities in petitioner's section was still in progress. In his own testimony, petitioner admitted that he had refused to answer certain questions posed to him, on the advice of counsel. He further testified that he had not been offered immunity from prosecution should he answer those questions.

The hearing officer found and concluded that petitioner had willfully refused to answer questions put to him and to produce his diary without justification and that such action constituted insubordination. In a determination dated November 23, 1984, the Commissioner adopted the conclusion of the hearing officer as to petitioner's insubordination and concluded further that petitioner "had the benefit of constitutionally sufficient use immunity * * *". He determined that petitioner should be dismissed from service.

Petitioner then brought a proceeding for judicial review under article 78 of the New York's Civil Practice Law and Rules, which was duly transferred to the Appellate Division, Third Department, for disposition. By a 3-2 vote, the Appellate Division ordered the determination annulled and petitioner reinstated in his job. 117 A.D.2d 151.

The majority found that "[w]hen a public employee is compelled to answer potentially incriminating questions relating to his work, he is automatically cloaked with transactional immunity under New York law". They held further that "an individual can stand on his right against self-incrimination until it is made clear to him that he will receive immunity". Accordingly, they held that by failing to declare petitioner's immunity clearly, respondent was barred from taking disciplinary action against him. The dissenters, agreeing that petitioner had automatic immunity, argued that petitioner's privilege against self-incrimination had not been violated and that he could be compelled to choose between termination and self-incrimination.

On appeal to the New York Court of Appeals, the order of the Appellate Division was reversed, unanimously, and the petition was dismissed. 71 N.Y.2d 154. The Court held that immunity from prosecution attached automatically when the petitioner was ordered to answer questions, over his constitutional objection, or face removal upon his refusal to do so. Thus, the Court concluded:

> "that insofar as petitioner was not requested to waive his right to immunity before answering questions specifically, directly and narrowly relating to his official duties, his dismissal did not violate fundamental fairness or his privilege against self-incrimination * * *". 71 N.Y.2d 154, 162.

ARGUMENT.

The decision of the New York Court of Appeals does not conflict with any decision of this Court because petitioner was not compelled to waive immunity from prosecution and his refusal to answer relevant questions about his official actions was the basis for his dismissal.

The petitioner in this proceeding holds a responsible supervisory position in the Department of Transportation and was called upon by the Commissioner to account for his stewardship. He refused to answer pertinent questions put to him on the matter under investigation, pleading his Fifth Amendment privilege on the advice of counsel. As a result of his refusal to account for his activities, he was discharged.

Notwithstanding the undeniable evidence that he refused to answer numerous questions relevant to his job when ordered to do so, petitioner maintains that his refusal was based on his right, under the Fifth Amendment, not to give testimony which would tend to incriminate him and that he cannot be dismissed from employment for invoking that right. Respondent submits that the privilege against self-incrimination does not preclude the dismissal of a public employee under these circumstances. *Uniformed Sanitation Men's Assn. v. Sanitation Commr.*, 426 F.2d 619 (2d Cir, 1970), *cert. den.*, 406 U.S. 961 (1970).

It is now well established that a public officer or employee, like any citizen, may not be required to surrender his constitutional privilege against self-incrimination and may not be discharged for refusal to waive immunity from prosecution arising from such testimony or the

fruits therein. *Gardner v. Broderick,* 392 U.S. 273 (1968); *Uniformed Sanitation Men's Assn. v. Sanitation Commr.,* 392 U.S. 280 (1968). Nor may the testimony of a public employee given under such compulsion be received in evidence in a subsequent prosecution against him. *Garrity v. New Jersey,* 385 U.S. 493 (1967); *Weston v. U.S. Dept. of Housing & Urban Development,* 724 F.2d 943 (Fed Cir, 1983).

The instant case, however, presents different circumstances in which the employee's right to immunity was not at stake. Under an administrative subpoena, he was asked questions specifically, narrowly and directly related to the performance of his official duties. He refused to answer such questions by invoking the Fifth Amendment. He was not asked to waive the privilege against self-incrimination—only to answer certain relevant questions, which he refused to do. Accordingly, he was properly charged with insubordination.

In *Uniformed Sanitation Men's Assn. v. Sanitation Commr.,* 392 U.S. 280, *supra,* decided at the same time as *Gardner v. Broderick,* this Court held that a public employee who refuses to answer questions directly related to the performance of his duties, without being required to waive immunity from prosecution, may be discharged for such refusal; however, the same employee could not be discharged for refusing to waive immunity. Accordingly, the discharge of those employees was annulled and they were reinstated. Thereafter, the employees were again called before the Commissioner and without being asked to waive immunity, refused to testify. They were again discharged and commenced a second action in the federal court, alleging a violation of their constitutional rights. This time, however, their discharge was sustained on appeal. *Uniformed Sanitation Men's Assn. v. Sanitation Commr.,* 426 F.2d 619, *supra.*

Writing for the Second Circuit in the second *Sanitation Men's* case, Judge Friendly reasoned from the prior decisions of the Supreme Court that "use immunity suffices" for the discharge of a public employee who refuses to account for the performance of his duties, and that use immunity attaches from the "very act of * * * telling the witness that he would be subject to removal if he refused to answer * * *". 426 F.2d at 626; citing *Garrity v. New Jersey,* 385 U.S. at 495. He quoted Justice Black in *Adams v. Maryland,* 347 U.S. 179, at 181 (1954), as follows:

> "Indeed, a witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to give over his objections. The Fifth Amendment takes care of that without a statute."

Thus, Judge Friendly concluded, at 627:

> "The proceeding here involves no attempt to coerce relinquishment of constitutional rights because public employees do not have an absolute constitutional right to refuse to account for their official actions and still keep their jobs; their right, conferred by the Fifth Amendment itself, as construed in *Garrity,* is simply that neither what they say under such compulsion nor its fruits can be used against them in a subsequent prosecution."

When counsel here continued to demand answers, under threats of termination, after petitioner had invoked his Fifth Amendment rights, immunity attached automatically to testimony given under those circumstances. Accordingly, petitioner could not then continue to refuse to answer and, at the same time, avoid disciplinary action

for insubordination. Thus, petitioner's right to immunity from prosecution based on his own testimony was never at stake in the proceedings and cannot be advanced as a defense to insubordination.

In this case, the interrogation took place as part of an administrative proceeding. Unlike a grand jury setting (*cf.* New York Criminal Procedure Law § 190.40), here the petitioner had his attorney beside him at all times. When petitioner was ordered to answer specific questions, after invoking his privilege against self-incrimination, full immunity from criminal prosecution attached by operation of law to any testimony given. *See Lefkowitz v. Turley,* 414 U.S. 70, 78-79 (1973); *Gardner v. Broderick,* 392 U.S. 273, 276-277 (1968); *Garrity v. New Jersey,* 385 U.S. 493, 500 (1967). He was not asked to waive his immunity and did not do so. Presumably, petitioner's attorney was aware that immunity was applicable; as observed by the dissenters in the Appellate Division, he had "ample opportunity to explore the implications of invoking [the] constitutional privileges". 117 A.D.2d 151, 514. Indeed, petitioner's counsel clearly implied that he had already researched the question to his satisfaction and suggested that the interrogator do so. Nevertheless, the result would be that the petitioner not only avoided answering the critical questions but also avoided the legitimate consequences thereof. Fairness does not compel such a result.

The reluctance of respondent's counsel to offer immunity openly should not alter the result since immunity applies "by operation of law". Here, the petitioner was afforded the opportunity of having counsel at the interrogation. He properly advised his client of his right to invoke the Fifth Amendment. When questioning persisted, counsel could have either requested a grant of immunity or advised his client that immunity would attach automatically. He did neither.

For the foregoing reasons, respondent submits that petitioner's refusal to answer specific, relevant questions pertaining to his official duties, by invoking his Fifth Amendment right, could not result in any criminal penalty or forfeiture, but could be used as the basis for terminating his employment. This result is not inconsistent with any of the foregoing decisions of this Court, and no further review is warranted.

CONCLUSION.

The petition should be denied.

Dated: Albany, New York
April 4, 1988

Respectfully submitted,

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